APPENDIX A-MEMORANDUM AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, DATED AND ENTERED MAY 2, 2000

2000 U.S. App. LEXIS 8837

JOSHUA W., and ANITA O., Plaintiff-Appellants, v. USD 259 BOARD OF EDUCATION, Wichita Public Schools; LARRY VAUGHN; USD 385 ANDOVER, Board of Education; PATRICK TERRY; PAM CLAPP; GARY HARMON; REED HARRISON; CARLY HAYNES; NANCY KIRKENDOLL; NANCY LUSK; RICH STENSON; ANDY TOMPKINS, and KANSAS STATE BOARD OF EDUCATION, Defendants-Appellees.

No. 98-3248

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2000 U.S. App. LEXIS 8837; 2000 Colo. J. C.A.R. 2392

May 2, 2000, Filed

JUDGES:
Before KELLY, HENRY, and MURPHY, Circuit Judges.

OPINIONBY:
Robert H. Henry

OPINION:

ORDER AND JUDGMENT[1]

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

I. Background

Plaintiffs Joshua W. and his mother Anita O. brought this action in 1997 under the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § § 1400* [*3] -1485, Section 504 of the Rehabilitation Act of 1973, *29 U.S.C. § § 701*-796, and *42 U.S.C. § 1983,* against defendants: the Andover Unified School District 385 (Andover USD), the individual members of the Andover USD's board of education and its superintendent, Terry Parker (Andover defendants); the Wichita Unified School District 259 (Wichita USD), individual members of the Wichita USD's board of education and its superintendent, Larry Vaughan (Wichita defendants); the Kansas Board of Education; and Dr. Andy Tompkins, the Commissioner of Education of Kansas. The district court dismissed the Andover defendants based on plaintiffs' failure to state a claim against them in their complaint. Thereafter, the district court granted summary judgment in favor of the Wichita defendants and Tompkins. The district court granted plaintiffs' request for

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Fed. R. Civ. P. 54(b) certification. We have jurisdiction under *28 U.S.C. § 1291,* and affirm both of the district court's decisions on review.

As an initial matter, we review briefly the IDEA and Kansas law as pertinent to disposition of this appeal. Under the IDEA, the federal [*4] government infuses states with funds "for the education of children with disabilities, guaranteeing disabled children between the ages of three and twenty-one access to a free, appropriate, public education (FAPE)." *Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1118 (10th Cir. 1999).* To receive federal funding, states must follow the IDEA's regulations, including identifying, locating, and evaluating "all children residing in the State who are disabled . . . and who are in need of special education and related services." *20 U.S.C. § 1412*(2)(C).[2]

The IDEA defines a "free appropriate public education" as "special education and related services" that:

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

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[2] In 1997, Congress amended the IDEA significantly. See *Erickson, 199 F.3d at 1118 n.1.* (citing Pub. L. No. 105-17, 111 Stat. 37 (1997)). The time frame at issue here predates those amendments, which are not retroactive. See id. Accordingly, we quote and cite to the provisions of the IDEA in effect at that time. The substance of the provisions that are referenced in this order and judgment remain substantially the same as their counterparts in the IDEA's present form.

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18). The individualized education program (IEP) required by the IDEA is prepared during a meeting with the child's teacher, a special education professional, and the child's parent(s). See *Erickson, 199 F.3d at 1118*. Among other things, the IEP reflects the child's abilities, special education goals, and the particular services the child will receive in furtherance of those goals. See id. The IEP must be reviewed at least annually and revised as necessary to ensure an appropriate education. See *20 U.S.C. § 1414*(a)(5).

Under Kansas law, residency with a parent who lives within [*6] the jurisdiction of the school district controls which school district is responsible for providing the free appropriate public education:

School residence; definitions. (a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c), the child lives in the district as a result of placement therein by a district court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

Kan. Stat. Ann. § 72-1046(a). "Person acting as parent" is defined, in relevant part, as follows:

[A] person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major

portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent [*7] jurisdiction.

Id. § 72-1046(d)(2)(B).

Joshua W. was born in May 1978, and has been eligible for special education services under the IDEA since 1985. His natural parents, Anita O. and Bruce W., divorced in 1980, and custody was awarded to Anita O. In 1988, Joshua W. moved in with his father and, although Anita O. has continued to support him financially, he has not lived with her since. Joshua W. has also lived with his adult sister. Throughout the years, Joshua W. has attended many different schools, some financed under the IDEA and some financed privately by Anita O. Joshua W.'s education history, as well as his whereabouts (including confinements as a juvenile offender), are set forth at length in the district court's orders on review and will not be reiterated herein. See Appellant's App., Vol. I at 39-46; Appellant's App., Vol. IV at 863-78.

In November 1995, Anita O. asked the Wichita USD for a private residential special education placement for Joshua W. Her request was related to Joshua W.'s then-recent guilty plea in the District Court of Saline County, Kansas. The criminal charges that resulted in the plea arose from an altercation between Joshua W. and [*8] Anita O. while she was driving him to a military academy (he threatened her with a knife). Joshua W. plead guilty to aggravated assault in September 1995 and was sentenced by the court on November 20, 1995. As part of Joshua W.'s sentence, the court ordered him to serve twenty-four months probation. Probation was conditioned on his entering and successfully completing Three Springs, a residential private facility

located in Tennessee. Anita O.'s efforts to "enroll" Joshua W. in the Wichita USD took place at the same time she was actively seeking his placement in Three Springs in order to avoid his incarceration.

The Wichita USD denied Anita O.'s request for private residential placement. Despite the denial, she placed Joshua W. in Three Springs. Although the Wichita USD had prepared an IEP for Joshua W., which was in effect from November 1994 to November 1995, it was not able to prepare an IEP for Joshua W. for the following year in conjunction with Anita O.'s request for residential placement. Essentially, Anita O.'s unilateral placement obstructed the IEP process. Moreover, she failed to inform the Wichita USD of the circumstances underlying her request for the placement.

Anita [*9] O. then pursued administrative remedies available under the IDEA by requesting an impartial due process hearing, see *20 U.S.C. § 1415*(b)(2), and unsuccessfully sought that the Andover USD be joined as a party to that hearing. An evidentiary hearing was held on October 4, 1996. The limited issue before the hearing officer was whether the Wichita USD was responsible for Joshua W.'s special education. The hearing officer found that Joshua W. was not a resident of the Wichita USD in November 1995 under applicable Kansas law. See Appellant's App., Vol. I at 156-58. Specifically, the hearing officer found that Joshua W. ceased to be a resident of the Wichita USD when his father--the resident parent--moved out of that district[3]. See id at 157. On plaintiffs' appeal, a due process reviewing officer affirmed the hearing officer's decision. See id. at 159-63.
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[3] n2 Anita O. moved out of the Wichita USD and into the Andover USD in March 1995. See Appellant's App., Vol. I at 157.

Despite plaintiffs' attack on the appropriateness and adequacy of Joshua W.'s entire special education experience, the focus of this litigation is limited to whether either the Andover or Wichita USD is responsible for paying for Joshua W.'s residential private placement commencing in November 1995. On appeal, plaintiffs contend that the district court erred by: (1) dismissing the Andover USD because it is a necessary/indispensable party; (2) dismissing the "alternative" IDEA claims against the Andover defendants; (3) granting summary judgment to the Wichita defendants; (4) dismissing the Rehabilitation Act and § 1983 claims arising out of the Wichita USD's purported violation of the IDEA; (5) granting summary judgment to Tompkins; and (6) dismissing the Kansas State Board of Education for failing to serve process under Fed. R. Civ. P. 4(m).

II. The Andover Defendants

We turn first to the district court's decision dismissing the Andover defendants on a motion to dismiss. We review de novo the sufficiency of a complaint and the district court's grant of a Fed. R. Civ. P. 12(b)(6) motion to dismiss. See *GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997).* [*11] In doing so, we apply the same standards applied by the district court. See *David v. City & County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996).* Specifically, we accept as true all the well-pleaded factual allegations in the complaint as viewed in the light most favorable to the nonmoving party. See *GFF, 130 F.3d at 1384.* Moreover, "[a] 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quotation omitted). Accordingly, we assess the limited question "whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991).*

Plaintiffs acknowledge that they failed to raise the issue of indispensable party below in defending against the Andover defendants' motion to dismiss, but argue that we should consider it nevertheless because we have an independent duty and should exercise our jurisdiction to do so. Essentially, plaintiffs argue that, without the Andover USD, it will be impossible to ascertain which school [*12] district is responsible for providing Joshua W. with special education and special services. Plaintiffs argue that, although by their own admission Joshua W. never resided in the Andover USD, the Wichita USD adopted the position that he did. Last, plaintiffs argue that the district court improperly based the dismissal on paragraph three of the complaint (which states that Joshua W. never resided in the Andover school district), and should have, under Fed. R. Civ. P. 8(e)(2), allowed the claims against all the Andover defendants to proceed.

Plaintiffs' attempt to argue joinder of a necessary/indispensable party under Fed. R. Civ. P. 19 obfuscates the real issue, i.e., whether the district court properly dismissed the Andover USD for plaintiffs' failure to state a claim in their complaint. Even if we were persuaded of Rule 19's applicability, and our "duty" to consider the issue of a necessary party on appeal in these circumstances, we would conclude that the Andover USD is neither a necessary nor indispensable party for purposes of that rule. See Fed. R. Civ. P. 19 (setting out factors to be considered in relevant analyses).

Based on our review of the complaint under the standards [*13] set forth above, we conclude as did the district court. Plaintiffs' complaint states that Joshua W. "has resided all his life in the Kansas school district of Wichita U.S.D. 259."

Appellant's App., Vol. I at 21, para. 3 (complaint)[4]; see also id. at 23, para. 18 ("Since 1988, Joshua W. lived in Wichita with various family members, including his father or adult sister but never with his mother."). Under the applicable Kansas law quoted above, Joshua W.'s residency controls. Plaintiffs have failed to plead any residency in the Andover USD. Neither are we persuaded by plaintiffs' contentions on appeal of "alternative" claims against the Andover defendants, in which plaintiffs essentially argue that: (1) the Wichita USD took the position that the Andover USD was responsible for Joshua W.'s special education needs; and (2) if Wichita is not responsible for meeting Joshua W.'s special education needs, the Andover USD had to be the responsible district. Although plaintiffs characterize this an alternative pleading permitted under Fed. R. Civ. P. 8(e)(2)--which condones inconsistent claims and defenses--that rule does not apply to this situation.

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III. The Wichita Defendants and Tompkins

Next, we review the district court's grant of summary judgment to the Wichita defendants and Tompkins. Generally, summary judgment is appropriately granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In reviewing a challenge under the IDEA, the district court engages in a modified de novo review, in which it must independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the

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[4] After the district court entered its order dismissing the Andover defendants, plaintiffs amended their complaint. The amended complaint still contains the same statement. See Appellant's App., Vol. II at 271, para. 3 (amended complaint).

preponderance of the evidence, while giving 'due weight' to the administrative proceedings below.

Erickson, 199 F.3d at 1120 (quotation omitted). We review the district court's decision granting summary judgment de novo, applying the same standards as that court. See id.

The district court found that:

Based upon the facts presented to the court, it would appear that Joshua was not entitled to educational services from the [Wichita USD] since he was neither living in or physically present in the district in November 1995, [*15] and was not living with a parent or person acting as a parent in the [Wichita USD]. Both Joshua's parents had moved out of the [Wichita USD]. Although plaintiffs assert that at some time Joshua continued to live in Wichita with his slightly older sister, the sister does not constitute a "person acting as parent" within the meaning of state law given the state of this record. Anita O. has directly acknowledged that she continued throughout this period to act to support Joshua and to make decisions regarding his control and education.

Appellant's App., Vol. IV at 873. The court concluded that "the uncontroverted facts establish that, by the time of the attempt, or, more accurately, the pretended attempt to enroll Joshua W. in November 1995, he cannot be considered a resident of the Wichita school district." Id. at 873-74 (footnote omitted).

Next, the court specifically found the evidentiary record before it supported the conclusion that "Anita O.'s actions were not prompted by a sincere effort to obtain a final decision from the [Wichita USD] regarding placement, but were simply seeking to manipulate the District into funding a placement upon which she had already [*16] resolved." Id. at 875 (footnote omitted). Because plaintiffs' Rehabilitation Act and § 1983 claims were based on the purported IDEA violation, the district court concluded that the individual

Wichita defendants were qualifiedly immune. See id. at 876. Last, the district court found Tompkins also qualifiedly immune. See id. at 878.

A review of the record confirms the district court's residency determination as well as its conclusions that Anita O.'s action in unilaterally placing Joshua W. in Three Springs was manipulative, was not undertaken for education purposes, and essentially obstructed the IDEA process. See *Wise v. Ohio Dep't of Educ., 80 F.3d 177, 184-85 (6th Cir. 1996)* (holding parents bear financial risk that unilateral private placement--without consent of school officials and effort to change placement through IDEA process--will not be reimbursed). Plaintiffs' arguments contra do not persuade us otherwise[5]. We agree with the district court, that, given these conclusions, there is no violation of constitutional and/or federal law, and plaintiffs' additional, undeveloped claims under the Rehabilitation Act and § 1983 fail, as do their claims [*17] against Tompkins.

IV. Kansas Board of Education

In this last issue, plaintiffs argue that the district court improperly dismissed the Kansas Board of Education under Fed. R. Civ. P. 4(m). We lack appellate jurisdiction to consider this issue. Specifically, the district court order from which plaintiffs seek relief was entered on November 10, 1998, approximately two months after their September 9, 1998 notice of appeal. The notice of appeal references only the two district court orders reviewed above. Plaintiffs must separately appeal the November 10, 1998 order and comply with the jurisdictional requirements of Fed. R. App. P. 3. See *Nolan v. United States Dep't of Justice, 973 F.2d 843, 846 (10th Cir. 1992)* ("Any subsequent appeals [after notice

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[5] In brief, plaintiffs argue that: while Joshua W. was not physically present in the Wichita USD, he continued to reside there; Joshua W.'s sister was acting as his parent; and Anita O.'s unilateral placement should not preclude reimbursement.

[*18] of appeal filed] must separately and individually comply with the Rules of Appellate Procedure."). For this reason, we also deny plaintiffs' motion for leave to amend their appeal to include all adverse district court orders through April 26, 1999 in lieu of filing separate appeals.

V. Conclusion

The judgments of the district court are AFFIRMED (orders dated June 19, 1997, and August 7, 1997), the plaintiffs' motion to amend their appeal to include all adverse district orders entered through April 26, 1999 is DENIED.

Entered for the Court

Robert H. Henry
Circuit Judge

APPENDIX B-MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, DATED AND ENTERED NOVEMBER 10, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF KANSAS

Cause No. 97-1042-JTM

JOSHUA W. and ANITA O.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS U.S.D. NO. 259, LARRY VAUGHN, THE KANSAS DEPARTMENT OF EDUCATION AND DR. ANDY TOMPKINS,

Defendants.

ORDER

On August 10, 1998, the court entered its order granting the summary judgment motions of defendants Unified School District No. 259 (the Wichita, Kansas school district) and Dr. Andy Tompkins. Plaintiffs subsequently appealed this decision. Currently before the court are two motions. In the first, the nominal defendant Kansas Department of Education has moved to dismiss the action for failure of service under Fed. R. Civ. Pr. 4 (m). In the second, the school district has moved for sanctions against plaintiffs.

Ordinarily, of course, a notice of appeal which is filed prior to the dismissal of all parties to an action is premature
in the absence of a Rule 54 (b) certification, and accordingly the notice "is ineffective to transfer jurisdiction from the district court to the court of appeal." Denver & Rio Grande Rd, v, Union Pac. Rd. , Case No. 93-1011-PFK, 1995 WL 254246 (D. Kan. April 28, 1995). However, where the remaining defendants have not been served with process, the unserved defendants are not deemed "parties" for purposes of Rule 54 (b), and the notice of appeal will not be considered premature. Bristol v. Fibreboard Corp., 789 F.2d 846 (10 Cir. 1986). Accordingly, the notice of appeal filed in the present action was not premature.

This court retains jurisdiction to consider matters collateral to the issues presented in the appeal. In particular, the court finds that it retains jurisdiction to consider the defendants' pending motions. A notice of appeal deprives the district court of jurisdiction to consider "the issues on appeal," but does not divest it of the ability to decide "collateral matters not involved in the appeal." Lancaster v. Independent Sch. Dist. No. 5, 149 F. 3d 1228 (10th Cir. 1998) (quoting Garcia v. Burlington Northern R. Co., 818 F. 2d 713, 721 (10th Cir. 1987). The validity of the state's motion under Rule 4 (m) was never in issue in the case prior to the notice of appeal, and there is no reason to think it would not be considered a collateral matter which the court has the power to consider. Indeed, cases which have held that unserved defendants are not "parties" for purposes of Rule 54 (b) have acknowledged that further action dismissing the unserved defendants would be taken by the district court. Federal Sav. & Loan Ins. V. Tullos-Pierremont, 894 F. 2d 1469, 1473 (5th Cir. 1990).

Having the ability to hear the state's motion, the court finds that it must be granted. Rule 4 (m) creates a strong presumption in favor of dismissal. If service is not perfected

in 120 days, the rule provides that the court "shall dismiss" the action, unless "the plaintiff shows good cause for the failure." Ignorance of the rules of procedure is not "good cause" within the meaning of Rule 4 (m). Buck v. Boeing Co. 103 F. 3d 137 (9th Cir. 1996). In Despain v. Salt Lake Area Metro Gang Unit, 13 F. 3d 1436 (10th Cir. 1994), the Tenth Circuit upheld a dismissal for untimely service, holding that "good cause" could not be predicated on actual notice of the action to the unserved defendants, a lack of prejudice to the defendants, or even allegations of "severe prejudice" to the plaintiffs. See also In re Kirkland, 86 F. 3d 172 (10th Cir. 1996) (inadvertence, neglect, mistakes of counsel, and absence of prejudice in themselves will not create good cause).

Good cause may be found where a defendant actively evades service. See, e.g., Cloyd v. Arthur Anderson & Co., 151 F.R.D. 407 (D. Utah 1993). Good cause may be found where the process server violates his duties of office. Byrd v. Stone, 94 F. 3d 217 (6th Cir. 1996). Whether a plaintiff has moved under Rule 6 (b) for an extension of time to obtain service is also an element to be considered. Gowan v. Teamsters Union No. 237, 170 F.R.D. 356 (C.D.N.Y. 1997). Here, the court is unable to find any potential rationale which the plaintiffs could offer which would serve as good cause. There is no indication that plaintiffs tried to serve the state, but were misled into thinking service had been achieved. Rather, the record indicates that no attempt at all was made to serve the state defendant. There has been no motion under Rule 6 (b). The plaintiffs may argue that they believed their service on the defendant Tompkins was the same thing as service on the state board of education. But, as indicated earlier, it is clear that mistakes of counsel and ignorance of the rule of service do not constitute good cause for extending the time of service. Hunsinger v. Gateway Management Assoc., 169 F.R.D. 152 (D. Kan. 1996); Slater v. Cincinnati Ins. Co., 165 F.R.D. 100 (D, Kan. 1996). Finally, is

anything, any consideration of potential prejudice would work against plaintiffs. Here, the failure of service has already lasted long beyond the 120-day limit. Substantial discovery in the matter has already occurred, and indeed dispositive motions have been submitted and considered.

The state school board's motion would be independently justified under D. Kan. Rule 7.4. This rule provides that, upon the failure to respond in a timely fashion to a motion, "the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." Here, plaintiffs have neither responded to the state school board's motion nor filed any motion seeking an extension of time to respond.[6] Accordingly, the state school board's motion is granted on the merits and pursuant to Rule 7.4.

The court will also deny the Wichita school board's motion for sanctions. The court in its discretion will deny the motion for sanctions. Although, as it has indicated in its previous orders, the court shares many of the concerns expressed in defendant's motion as to the conduct of plaintiff Anita O. and counsel for plaintiffs, the court does not find an award of sanctions is justified. In its previous order of august 26, 1998, the court denied the Andover School district's motion for sanctions, and the Wichita board's motion will be denied on the same grounds.

IT IS ACCORDINGLY ORDERED this 10th day of November, 1998, that the motion to dismiss of defendant Kansas State School Board (Dkt. No. 111) is hereby granted; the motion for sanctions (Dkt. No. 113) of defendant U.S.D. No. 259 is hereby denied.

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[6] Plaintiffs did telephone the chambers of the undersigned, after the deadline for a response had already passed, seeking advice about whether to respond to the state school board's motion. It is not for the court to give advice on pleading to individual parties.

J. THOMAS MARTEN, JUDGE

APPENDIX C-JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED NOVEMBER 10, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 97-1042-JTM

JOSHUA W. and ANITA O.,

PLAINTIFFS,

v.

BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS U.S.D. NO. 259, LARRY VAUGHN, THE KANSAS DEPARTMENT OF EDUCATION and DR. ANDY TOMPKINS,

DEFENDANTS.

JUDGMENT IN A CIVIL CASE

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the Order filed and entered on the docket on November 10, 1998 (Dkt. No. 120), that the motion to dismiss of defendant Kansas State School Board (Dkt. No. 111) is hereby granted; the motion for sanctions)Dkt. No. 113) of defendant U.S.D. No. 259 is hereby denied.

Dated: November 10, 1998 Ralph L. Deloach, Clerk

By: s/ S. Smith

Deputy Clerk

APPENDIX D-OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AUGUST 7, 1998

1998 U.S. Dist. LEXIS 12493

JOSHUA W. and ANITA O., Plaintiffs, vs. BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS U.S.D. NO. 259, LARRY VAUGHN, THE KANSAS STATE BOARD OF EDUCATION, and DR. ANDY TOMPKINS, Defendants.

No. 97-1042-JTM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

13 F. Supp. 2d 1199; 1998 U.S. Dist. LEXIS 12493

August 7, 1998, Decided

August 7, 1998, Filed

OPINIONBY:
J. THOMAS MARTEN

OPINION:

[*1200] MEMORANDUM AND ORDER

Plaintiffs Joshua W. and his mother Anita O. have brought the present action under the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § 1400* et seq. against the Wichita School District, U.S.D. 259, along with the individual members of the board of education and its Superintendent, Larry Vaughn, as well as the Kansas Board of Education and the Commissioner of Education, Dr. Andy [**2] Tompkins. In an order dated June 11, 1997, the court granted a motion to dismiss similar claims raised against the Andover School District. Currently before the court are two motions for summary judgment by the Wichita defendants and by Commissioner Tompkins.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital, 854 F.2d 365, 367 (10th Cir. 1988).* The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a [*1201] reasonable doubt. *Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985).* The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co., 812 F.2d 1319, 1323 (10th Cir. 1987).*

In resisting a motion for summary [**3] judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed.*

2d 202, 106 S. Ct. 2505 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (quoting Fed.R.Civ.P. 56(e)) (emphasis in Matsushita). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S.* [**4] *Ct. 2548 (1986).*

1. Motion by the Wichita Defendants

The District's motion is similar to that advanced previously by the Andover School District -- that liability under IDEA does not exist since Joshua was not a resident of the school district[7]. The Wichita District argues that, on the basis of the facts produced in discovery, Joshua may have been a resident of the Andover District or some other location, but that he was not a resident of the Wichita District at the time of the attempted November 20, 1995 enrollment. The evidence and factual statements submitted by the parties compels the following findings of fact.

Joshua W. was born on May 1, 1978, and is now 19 years of age. His natural parents are Mr. Dennis W. and Ms. Anita O. Anita O., who has had sole custody of Joshua since a 1980 divorce, is the sole owner of W[ ] Building [**5] Maintenance, a commercial cleaning business with 175

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[7] In its prior order on the motion to dismiss, the court addressed the background and purposes of IDEA, and those conclusions are equally applicable here.

employees. Joshua W. and his parents resided in Wichita, Kansas while he was growing up, where he attended the public schools of U.S.D. 259 until approximately January 27, 1995.

District educators identified Joshua W. as behaviorally disordered, and he was given special education under the IDEA throughout his attendance in the school system pursuant to individualized education programs (IEP). In their response to the defendants' summary judgment motion, the plaintiffs vigorously and persistently attack the adequacy of these earlier programs, but the present complaint is directed solely at whether U.S.D. 259 is required to pay for the private residential placement in 1995.

In November of 1994, the District revised the IEP for Joshua, calling for placement in a special day school. Joshua's parents consented to the new IEP. The sixteen-year-old Joshua was transferred from Wichita High School Northwest to Sowers Alternative School, a special day school offering special education to behavior-disordered students. After arriving at Sowers, Joshua was on separate occasions confined as a juvenile offender at the Sedgwick County Youth Residence [**6] Hall (YRH), where he also received education services from the District.

On January 27, 1995, Joshua left YRH. He did not return to Sowers, and quit attending classes in the District's schools. He lived in a number of locations, both inside and outside Kansas. According to the testimony of Anita O., in February of 1995, Joshua was confined at juvenile facilities in Larned, Kansas for approximately six months. In July, he spent a brief period of time in Charter Hospital receiving substance abuse treatment. He also received mental and substance abuse treatment at Shadow Mountain, a residential facility in Tulsa, Oklahoma.

According to the plaintiffs, Joshua lived intermittently with his father, and could be [*1202] found at 144 S. Sheridan in Wichita. Anita O. provided Joshua's support.

On September 1, 1995, Joshua W. threatened Anita O. with a knife while she was driving him to St. John's Military School in Salina, Kansas. Anita O. filed a formal criminal complaint and Joshua was placed in the Saline County Jail. He was prosecuted as an adult for aggravated criminal assault in violation of K.S.A. 21-3410(a). He plead guilty to the charge on September 22, 1995. His sentencing hearing was [**7] scheduled for November 20, 1995, and he was authorized to attend Kemper Military Academy in Boonville, Missouri until the date of his sentencing.

Joshua began attending Kemper in early October, 1995. While at Kemper he was cited for violating the school's code of conduct and expelled at the order of the commandant.

Previously, on March 1, 1995, Anita O. changed her residence to a location outside U.S.D. 259, moving to a new home at 14221 East Sport of Kings, within the boundaries of U.S.D. 385, the Andover, Kansas School District. She acknowledged in her deposition that she knew she was moving into another school district because she had another school age child. Joshua's father, Dennis W., also left U.S.D. 259 in the spring of 1995, moving to Potwin, Kansas.

Prior to November 2, 1995, Anita O. contacted Three Springs Outdoor Therapeutic Program, a residential educational facility for adolescents in Centerville, Tennessee, to inquire about enrolling Joshua. On November 4, she completed a enrollment form for Three Springs for the 1995-96 school year. On November 6 and 7, she telephoned Three Springs six times. Joshua was eventually admitted to Three Springs on November 20, 1995. [**8] On November 16, Anita O. bought two airline tickets for herself and Joshua to fly from Kansas City, Missouri to Nashville, Tennessee.

She did not use the tickets. On November 17, 1995, she called the District's Office of Special Education and Robert Coleman, the principal of Sowers, to discuss Joshua's re-entry into the District school system. Coleman told Anita O. she should enroll Joshua at Sowers since this was the last placement under the IEP, and the staff there could then talk to her about options for placement. Joshua was then enrolled at Sowers, although he remained physically at Kemper. At this time, Joshua had not attended any school in the district for almost ten months. His IEP was due to be reviewed November 18, 1995. During the discussion on November 17, a meeting to discuss Joshua's placement was set for Monday, November 20 at Sowers.

On November 20, Anita O. met with Coleman, and with school psychologist Tom White, social worker Carolyn Moncivais, and guidance counselor Ken Henderson. Anita O. signed release forms so the staff could obtain information about Joshua's activities since last attending Sowers. Coleman told Anita O. that, pursuant to the IEP, Joshua would [**9] attend Sowers until the school got the additional information and developed a revised IEP and placement decision.

Anita O. asked for residential placement, but testified that she knew no decision had been made at that time. In addition, while she told the staff of the address in Wichita where Joshua would be living, Anita O. did not inform the District that she had moved into a new school district, nor did she inform the District that she had been working to enroll Joshua at Three Springs in Tennessee. According to her deposition testimony, Anita O.'s primary concern was finding a way for the District to pay for placement at Three Springs.

The same day Anita O. met with the Sowers staff, Joshua appeared in Saline County Court for the sentencing hearing which had been set nearly two months earlier. He was

sentenced to an 18-month term of imprisonment. In lieu of prison, the court put Joshua on probation for 24 months. As a condition of the probation, Joshua was required to enter and complete the program at Three Springs and obtain an alcohol, drug, and mental health evaluation there.

Immediately following her meeting with the Sowers staff in Wichita on November 20, Anita O. drove [**10] to Boonville, where she picked up Joshua. On November 21, they drove to Kansas City and then flew to Nashville, Tennessee. They used separate tickets from those purchased on November 16. Using a [*1203] rental car, they drove to Centerville and Joshua was placed at Three Springs. Following up the November 20 meeting, District staff tried to contact Anita O. to discover where Joshua was. Anita O. did not return these telephone calls. On December 4, her attorney wrote that she was beginning an administrative claim.

The District did not learn of Anita O.'s residence in the Andover School district until January 16, 1996. Following an evidentiary hearing on October 4, in which both the parties were represented by counsel and presented witnesses, an administrative hearing officer found that Joshua was not a resident of the District on November 20, 1995, and that the District was not financially responsible for his placement. Anita O. appealed this determination, which was affirmed by a state review officer appointed by the Kansas State Board of Education on December 31, 1996. The present action was instituted January 30, 1997.

Joshua attended Three Springs in Tennessee until October of 1996. On [**11] November 27, 1996, the Saline County District Court modified the terms of Joshua's probation, requiring him to enter and complete a program at Benchmark, a private facility in Redlands, California.

Joshua left without completing the Benchmark program after three months. On December 1, 1997, he was convicted

of two counts of aggravated assault and of possession of marijuana in the District Court of Sedgwick County. On January 8, 1998, he was sentenced to a term of imprisonment of 25 months.

Defendants argue there is evidence which directly contradicts the plaintiffs' assertion Joshua lived in Wichita. In bonding out on the Saline County criminal case, Joshua wrote that his address was 14221 East Sport of Kings, Wichita, Kansas, 67203 -- within the Andover School District. The plaintiffs deny this, and repeatedly point to an "SRS determination that Joshua not live with his mother." The document cited by plaintiffs, Exhibit 4, however, does not prohibit Joshua's living with his mother. Joshua had been admitted to Larned Youth Center following a felony theft. In Exhibit 4, a social worker for SRS wrote in August of 1994 that he was "approving his moving effectively to his father's home" [**12] in Wichita. Although the letter does recognize that there was a "conflictive relationship" between Joshua and his mother, the letter does not prohibit Joshua from living with his mother. Indeed, the letter actually contemplates the possibility that Joshua would stay with his mother, recommending the parties reach a joint set of rules "for Joshua to abide by regardless of which home he is at." (Exh. 4, emphasis added).

The main issue here is the IDEA claim by the plaintiffs against the District[8].
- [**13]

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[8] To the extent the Amended Complaint raises issues beyond the 1995-96 school year placement such as a denial of free appropriate public education (FAPE), those issues have never been subjected to administrative review, which considered only the narrow issue of Joshua's residency. Thus, the pervasive attack on the entirety of Joshua's education in the District, which the plaintiffs raise for the first time in their response to the summary judgment motion, should be dismissed for the failure to exhaust administrative remedies.

Two grounds exist for dismissing the present action. As noted in the court's order of June 11, 1997, a school district's obligation to enroll a given student turns upon residency. KSA 72-1046(a) provides a right to attend school in a district based upon residence:

Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child....

The statute also explicitly defines "a person acting as parent" as

(A) a guardian or conservator, or B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction....

72-1046(d).

Based upon the facts presented to the court, it would appear that Joshua was not [*1204] entitled to [**14] educational services from the District since he was neither living in or physically present in the district in November 1995, and was not living with a parent or person acting as a parent in the District. Both Joshua's parents had moved out of the School District. Although plaintiffs assert that at some time Joshua continued to live in Wichita with his slightly older sister, the sister does not constitute a "person acting as parent" within the meaning of state law given the state of this

record. Anita O. has directly acknowledged that she continued throughout this period to act to support Joshua and to make decisions regarding his control and education.

As the court previously concluded, a school district has the obligation under IDEA to seek out disabled children, whether they are enrolled or not, who require special attention. See *Robertson County Sch. Sys. v. King, 1996 U.S. App. LEXIS 27257,* 24 IDELR 1036, Case No. 95-5526 (6th Cir. 1996). A school district is not required, however, to disregard established rules of residency and undertake the burdensome task of searching throughout the entire state for disabled children. See *Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th* [**15] *Cir. 1987);* Hall by and through *Allread v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).* Here, the uncontroverted facts establish that, by the time of the attempt, or, more accurately, the pretended attempt to enroll Joshua in November of 1995, he cannot be considered a resident of the Wichita school district[9].
- [**16]

The District also argues that plaintiffs should not be permitted to impose financial responsibility on the District where Anita O.'s own actions effectively prevented the District from reviewing Joshua's status and formulating a new IEP. The purpose of the IDEA is to "ensure that the local educational agency and the parents work collectively in finding an appropriate placement for their child." *Fagan v.*

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[9] The present result is not inconsistent with earlier dismissal of the Andover school district, which reflected a failure in the pleadings by the plaintiffs; the present summary judgment motion is premised on a failure of proof. That is, the action against the Andover School District could not be maintained in light of the plaintiffs' direct statement in the complaint that Joshua had "resided all his life" in the Wichita School District. The plaintiff never attempted to correct or even qualify this assertion by amendment or other means. The uncontroverted facts submitted with the present motion establish that Joshua was not residing in the Wichita school district during the time prior to his enrollment.

District of Columbia, 817 F. Supp. 161, 164 (D.D.C. 1993). If a parent's acts frustrate the decision making process, the parent may be estopped from relief under the IDEA. Thus, in *Wise v. Ohio Dept. of Educ., 80 F.3d 177, 184 (6th Cir. 1996),* the court concluded that by "unilaterally changing their children's educational placements, the parents are not entitled to have their children educated at public expense."

The evidentiary record before the court supports a similar conclusion. At the time she contacted District officials in November, 1995, Anita O. had effectively engineered Joshua's placement in a private facility in Tennessee. She had purchased airline tickets for travel to Tennessee, and had enrolled her son at the Tennessee facility. She mentioned none of this to [**17] District staff. She has acknowledged that, at the conclusion of her discussions with the staff, she knew the District had made no decision regarding Joshua's placement. She knew that the staff said they "would need to further evaluate Josh and Josh's situation before they made a final decision." (Tr. at 209). When the staff asked where Joshua was living, she stated that he could be picked up at the address on South Sheridan, even though she knew Joshua was currently at a military school in Missouri and would be moved to Tennessee immediately after her discussion with the staff.

Thus, Anita O.'s actions were not prompted by a sincere effort to obtain a final decision from the District regarding placement, but were simply seeking to manipulate the District into funding a placement upon which she had already resolved[10].

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[10] As noted previously, the court is not unmindful of plaintiffs' claims that the District for several years failed to fulfill plaintiff's obvious need for a residential placement, and that it never had such a facility in the District. Those claims may be valid, but do not fall within the scope of this action as plaintiffs framed it.

[*1205] In the Amended Complaint filed by plaintiffs, the allegations which form the core of the IDEA claim are substantially repeated and then set forth in Counts II and III as violations of section 504 (FAPE) and *42 U.S.C. § 1983.* In light of the findings cited above relating to the removal of Joshua from Kansas, the court finds the individual Wichita School District defendants are qualifiedly immune with respect to the section 504 and *42 U.S.C. § 1983* claims advanced by plaintiffs.

2. Motion by Defendant Tompkins

Defendant Tompkins explicitly adopts the argument of the Wichita District that Anita O. frustrated the evaluation process. He also argues he is qualifiedly immune for failing to intervene in the due process proceedings initiated by Anita O. Finally, he argues generally that tuition reimbursement is inappropriate and there is no guarantee of a free public education where a special education student voluntarily accepts admission to an out-of-state facility at his own expense to escape imprisonment as the result of a felony criminal case.

The plaintiffs have now submitted a Response to Tompkins' Motion for Summary Judgment. Despite obtaining an extension of time [**19] to file their response, the response was filed several days beyond the extended deadline. It was not signed by local counsel[11]. Most importantly, the Response provides only a separate narrative of the facts, completely ignoring the statement of facts in Tompkins' motion. The Response thus violates D. Kan. Rules 7.4, 83.5.4(c), and 56.1.

The court finds that the first two violations should not be and are not fatal to plaintiffs' claims. The delay in the

[11] Another copy was filed approximately one week later which was signed by local counsel.

response was not significant, and plaintiffs have subsequently obtained new local counsel who has filed an appearance in the matter. The failure to comply with the standards for responding to a motion for summary judgment cannot be excused so easily, however. Rule 56.1 contains its own sanction -- all of the facts presented in the defendant's motion will be deemed uncontroverted[12].

Since the facts presented to the court are wholly those presented by defendant, the court is compelled to concur with each of the arguments advanced by the defendant. Accordingly, the court finds the placement in Tennessee to obtain probation does not qualify as a unilateral placement for educational purposes under *Burlington School Comm. v. Mass. Dept. of Ed., 471 U.S. 359, 371, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985);* that defendant Tompkins did not violate plaintiffs' due process rights and in any event is qualifiedly immune; and that Anita O.'s actions effectively frustrated the evaluation and review of Joshua's placement. Accordingly the claims against defendant Tompkins will be dismissed.

A motion to reconsider is neither invited nor encouraged. Any such motion shall be filed within ten days of the date of this order. Any motion for reconsideration must comply with Rule 7.3 of this court and the standards set out in *Comeau v. Rupp, 810 F. Supp. 1172, 1174 (D.Kan.1992).* The motion may not exceed five pages in length, including supporting arguments and authorities, regardless of the number of points raised. Responses shall be filed within five days of the date of such [**21] a motion, and shall be limited to four pages each. No replies may be filed.

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[12] Nor will the court delve through defendants' lengthy narrative in an attempt to correct the error and identify controverted facts. The very purpose of Rule 56.1 is to avoid such a misdirection of judicial resources. Moreover, such an approach would vitiate the explicit sanction contained within the rule -- the requirement that the facts which are not admitted or denied will be deemed admitted.

IT IS ACCORDINGLY ORDERED this 7th day of August, 1998, that the defendants' Summary Judgment Motions (Dkt. Nos. 68 and 96) are granted.

J. THOMAS MARTEN, JUDGE

APPENDIX E- MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND ENTERED JULY 22, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
NO. 97-1042-JTM
JOSHUA W. and ANITO O.,

Plaintiffs

vs.

BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS, U.S.D. 259; et al.,

Defendants

MEMORANDUM AND ORDER

The plaintiffs in the present action, Joshua W. and Anita O., brought a claim against the Wichita and Andover School Districts under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. On June 11, 1997, the court granted the Andover defendants' motion to dismiss, finding the fact allegations in the complaint that Joshua W. had lived "all his life" in the Wichita School District precluded any recovery against the Andover defendants.

The plaintiffs now move for reconsideration of the June 11 order. A motion to reconsider under Fed.R.Civ.P. 59 (e) may be granted to correct manifest errors or in light of newly discovered evidence. Such a motion is directed not at initial consideration but reconsideration, and is appropriate only if (1) the court has obviously misapprehended a party's

position, the facts, or applicable law; (2) the court has mistakenly decided issues not presented for determination; or (3) the moving party produces new evidence which it could not have obtained through the exercise of due diligence. Anderson v. United Auto Workers, 738 F.Supp. 441, 442 (D Kan. 1989). A motion to reconsider is not "a second chance for the losing party to make its strongest case or to dress up arguments that previously failed." Voelkel v. GMC, 846 F. Supp. 1482 (D. Kan.), aff'd, 43 F. 3d 1484 (10th Cir. 1994). The resolution of the motion is committed to the sound discretion of the court. Hancock v. City of Oklahoma City, 857 F. 2d 1394, 1395)10th Cir. 1988).

The sole issue before the court in its prior order was the sufficiency of plaintiffs' complaint against the Andover defendants. As noted in the order of June 11, the express fact allegations of the complaint, which plaintiffs have not attempted to amend, prevent any recovery under IDEA against the Andover defendants. The plaintiffs' current motion raises no new fact allegations or arguments demonstrating error in the court's application of the law. Rather, plaintiffs argue that "by process of elimination" one of the school districts must be responsible. This argument is wholly without merit: the plaintiff's claims against the Andover defendants were barred by their own admissions; their claims against the Wichita defendants are, for now, legally sufficient; and plaintiffs will be given the opportunity to prove those claims at trial and, upon motion, at summary judgment.

IT IS ACCORDINGLY ORDERED this 21st day of July, 1997, that plaintiff's motion to reconsider (Dkt. No. 34) is hereby denied.

SO ORDERED.

ENTERED: July 22, 1997

s/ J. THOMAS MARTEN
J. THOMAS MARTEN, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F- MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED JUNE 10, 1997 AND ENTERED JUNE 11, 1997

1997 U.S. Dist. LEXIS 9457

JOSHUA W. and ANITA O., Plaintiffs, vs. BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS, U.S.D. NO. 259; LARRY VAUGHN; JANET DANITSCHEK; CHIP GRAMKE; CLARADINE JOHNSON; MARTY MARSHALL; CAROL RUPE; JEAN SCHODORF; JEROME WILLIAMS; BOARD OF EDUCATION OF ANDOVER, U.S.D. NO. 385; PATRICK TERRY; PAM CLAPP; GARY HARMON; REED HARRISON; CARLY HAYNES; NANCY KIRKENDOLL; NANCY LUSK; RICH STENSON; ALAN ALDERSON; THE KANSAS DEPARTMENT OF EDUCATION; and DR. ANDY TOMPKINS, Defendants.

No. 97-1042-JTM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1997 U.S. Dist. LEXIS 9457

June 10, 1997, Decided

June 11, 1997, FILED

OPINIONBY:
J. THOMAS MARTEN

OPINION:

MEMORANDUM AND ORDER

In the present action, the plaintiffs, Joshua W. and his mother Anita O., have raised a claim under the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § 1400* et seq., against the Wichita and Andover Unified School Districts, the individual members of the school boards, and the Kansas Department of Education. The Andover defendants have filed a motion to dismiss and a motion for sanctions. For the reasons discussed herein, [*2] the court will grant the former and deny the latter.

According to the complaint, since March 1, 1995, Anita O. has resided in the Andover School District at 14221 East Sport of Kings, Wichita, Kansas. However, her son, Joshua W., has never lived at the Sport of Kings address, and has never lived in the Andover School District. Instead, Joshua has "resided all his life in the Kansas school district of Wichita U.S.D. 259." (Complaint, P 3.)

On November 17, 1995, Anita O. contacted the Wichita School District and asked for residential special education placement for Joshua. Anita O. "made sure that Joshua W. was enrolled in Wichita 259 where he lived and provided Wichita 259 with her home address." (Complaint, P 24.) The Wichita School District denied this request on November 20, 1995, and on the next day Anita O. placed Joshua in Three

Springs residential special education placement in Tennessee (Id. at P 32.)

Anita O. filed a request for an impartial due process hearing against the Wichita School District. On January 16, 1996, the Wichita School District upheld its decision. On February 1, counsel for Anita O. sent a letter to the Andover School District requesting a hearing, [*3] and asking that the Andover School District be joined to the pending hearing against the Wichita School District "in the event that it is determined that [the Andover District] is ultimately responsible. (Complaint, Attach. C.) It is admitted that Anita O. never attempted to enroll Joshua in the Andover School District and never asked that district to evaluate Joshua or prepare and IEP for him.

Under IDEA, Congress provides federal money to state and local educational agencies for the education of disabled children, and has required the states to provide all disabled children with a "free appropriate public education." *20 U.S.C. § 1401*(a)(18). See *Urban by Urban v. Jefferson County School Dist. R-1, 89 F.3d 720, 722 (10th Cir. 1996).* To implement this goal, the states must provide each disabled child with an individualized education program (IEP), which must be reviewed at least annually. *20 U.S.C. § 1414*(a)(5). Congress intended that IDEA's promise of a "free appropriate public education" for disabled children would normally be met by an IEP's provision for education in the regular public schools or in private schools chosen jointly by school officials and parents.

Section [*4] 1401(a)(18) defines "free appropriate public education" as special educational services which

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program . . . ."

Under the IDEA, parents are entitled to bring a complaint on any matter relating to the evaluation or placement of their child and seek an impartial due process hearing on their complaint. Specifically, *20 U.S.C. § 1415*(b) provides:

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of [*5] the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph [*6] (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Any party aggrieved by the hearing officer's administrative findings and decision may appeal to the state educational agency for an independent and impartial review. *20 U.S.C. § 1415*(c). The reviewing officer must make an independent decision. Adverse decisions may be appealed to a district court without respect to the amount in controversy under § 1415(e)(2). The reviewing court must examine the records of the administrative proceedings, hear additional evidence if requested by a party, and base its decision on the preponderance of the evidence.

Under *34 C.F.R. 300.506(b)*, the impartial due process hearing is to be conducted by "the SEA [state education agency] or the public agency directly responsible for the [*7] education of the child, as determined under State statute, State regulation, or a written policy of the SEA." In Kansas, the due process hearing is the responsibility of the local

education agency (LEA) responsible for the education of the student. K.A.R. 91-12-44.

The Kansas State Plan for Special Education provides that "local education agency" is defined as

a. the unified school district in which the student lives either with his or her parents, or in a community placement made by district court of the Department of Social and Rehabilitation Services (SRS) or

b. SRS if a student has been admitted to or is housed and maintained in a State institution.

(Defs.' Memo., Ex. B at 85.)

This portion of the state plan is consistent with K.S.A. 72-1046(a), which provides:

(a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c), the child lives in the district as a result of placement therein by a district [*8] court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

Dismissal of the present action would appear appropriate, since the complaint itself establishes that Joshua has never resided in the Andover School District. Kansas law clearly establishes that the local institution responsible for complying with the terms of the IDEA is the local school district in which the student actually resides.

In their response, the plaintiffs make only two arguments of substance. First, they argue the Andover School District had an obligation under the IDEA to seek out and provide

assistance to Joshua. The cases cited by the plaintiffs, however, merely establish that a school district has this obligation with regard to enrolled or unenrolled children. See Robertson County Sch. Sys. v. King, 24 IDELR 1036, Case No. 95-5526 (6th Cir. 1996). The plaintiffs cite no case or authority to establish that a school district must or should disregard established rules of residency and undertake the burdensome task of searching throughout the entire state for disabled children. To the contrary, residency does provide a limitation on the scope of a given school [*9] district's duty under the IDEA. See *Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th Cir. 1987); Hall v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).*

The plaintiffs also cite K.S.A. 72-1046(b), which provides:

(b) Any child who has attained the age of eligibility for school attendance may attend school in a school district in which the child is not a resident if the school district in which the child resides has entered into an agreement with such other school district in accordance with and under authority of K.S.A. 72-8233, and amendments thereto.

However, subsection (b), by its express terms, is permissive only. It certainly did not compel Andover School District to consider Joshua W., who had never resided in the district and never attempted to enroll within the district as an actual or potential student.

Accordingly, the court will grant the Andover defendants' motion to dismiss the complaint. The result advocated by the plaintiffs would unreasonably and unnecessarily extend the scope of the IDEA, requiring local school districts to disregard established residency rules and conduct statewide searches for prospective students with disabilities. [*10]

There remains the motion for sanctions filed contemporaneously by the Andover School District. It must be noted the plaintiffs defend against the motion for sanctions on the same grounds as for the motion to dismiss -- that the action is in fact meritorious. As indicated above, the court finds no substantial justification for this position; the plaintiffs' arguments are no more correct with regard to rebutting the motion for sanctions than they are in defending against the motion for dismissal.

However, there are two potential fact circumstances which mitigate against an award of sanctions for filing the claim against the Andover School District. First, in its published statement, the Wichita School District denied the request for placement on the grounds that Joshua W. was a resident of the Andover School District. Second, in its published statement denying placement, the Andover School District did so for the stated reason that Joshua was not "enrolled" in the district.

Neither fact supports denying the motion to dismiss. With respect to the second of these two points, it is incorrect as a matter of law since, as discussed earlier, "enrollment" does not limit a school district's [*11] duty under the IDEA. Residency, however, does, as the plaintiffs would have known if they had reviewed the applicable law. With respect to the first point, whatever the Wichita School District may have said, the plaintiffs plainly disagree, alleging that Joshua has lived "all his life" in the Wichita School District. The complaint is completely devoid of any allegation that Joshua ever resided in the Andover School District. Since these facts at least provide some potential justification for concluding that the action against the Andover defendants was not undertaken for any improper purpose, the court in its discretion will deny the motion for sanctions.

IT IS ACCORDINGLY ORDERED this 10th day of June, 1997, that the Andover defendants' motion to dismiss

(Dkt. No. 20) is granted; their motion for sanctions (Dkt. No. 25) is denied.

J. THOMAS MARTEN, JUDGE

APPENDIX G - DECISION OF THE SPECIAL EDUCATION DUE PROCESS REVIEWING OFFICER DATED DECEMBER 31, 1996

BEFORE THE SPECIAL EDUCATION DUE PROCESS REVIEWING OFFICER

IN THE MATTER OF JOSHUA W. AND THE UNIFIED SCHOOL DISTRICT #259

REVIEWING OFFICER'S REPORT

NOW, on this 31st, day of December, 1996, the decision of the Reviewing Officer is rendered in the above-captioned appeal. Pursuant to K.S.A. 1995 Supp. 72-874, the Reviewing Officer has:

(1) Examined the record of the hearing:
(2) determined whether the procedures at the hearing were in accordance with the requirements of due process;
(3) determined that neither oral nor written argument was necessary;
(4) determined that no additional evidence was necessary for a final resolution;
(5) rendered a decision within a period which was extended by agreement of both parties; and
(6) has sent written notice of this decision on the appeal of both parties.

The Notice of Appeal was filed by Counsel for the child's Mother on November 12, 1996, following a due process hearing decision filed by Michael P. Tilford. The Hearing Officer's Decision was filed on or about October 13, 1996. Therefore, the Notice of Appeal was timely filed.

By letter dated November 18, 1996, the Reviewing Officer established that he would review the record prior

to determining whether additional evidence would be necessary. By that letter, the Reviewing Officer requested that the Hearing Officer's Decision and the record on appeal be forwarded to the Reviewing Officer. The Decision and the transcript with exhibits were received by the Reviewing Officer on or about December 2, 1996. By the letter dated November 18, 1996, the Reviewing Officer advised that a waiver of the twenty-day review requirement of K.S.A. 1995 Supp. 72-974, pursuant to K.S.A. 72-975 (c), would be necessary.

Having reviewed the record, this matter is now ripe for the Reviewing Officer's Report.

NATURE OF DISPUTE

This is an appeal from a decision rendered by Michael P. Tilford, Hearing Officer, on the 13th day of October, 1996, which found that Joshua W. was not a resident of USD 259 during the 1995-96 school year.

DUE PROCESS PROCEEDINGS

Based upon a thorough review of the record in this matter, it is the opinion of the Reviewing Officer that appropriate due process procedures have been followed and applied by the Hearing Officer in this matter. The Reviewing Officer finds that all of the due process procedural requirements set forth in K.S.A. 72-973 have been provided as follows:

1. The hearing provided for in K.S.A. 72-972 was held a place reasonably convenient to the parents of Joshua Wilson;
2. the hearing was closed at the request of the parents;
3. the following procedural due process rights were afforded:
    (a) The right of each party to have counsel of their own choice and to receive the advice of such counsel;
    (b) the child, Joshua W., was given the opportunity to be present at the hearing;

(c) Joshua W. and his parents have been given an opportunity to read a full report of the testimony of witnesses responsible for recommending the School District's proposed action and all other material witnesses:
(d) each of the parties was given the opportunity to confront and cross-examine witnessed who were required to appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;
(e) neither party was denied the right to present witnessed in person or their testimony by affidavit;
(f) both the child and the parents were given the opportunity to testify and give reasons in opposition to the proposed action of the School District;
(g) each of the parties was given the right to prohibit the presentation of any evidence at the hearing which has not been disclosed to them at least five (5) days prior to the hearing;
(h) the parties were each afforded an orderly hearing;
(i) the child, Joshua W., has been afforded a fair and impartial decision based upon substantial evidence in all other regards; and
(j) the parties have been given the right to have a record made of the hearing by an official court reporter; and

4. Furthermore, there is no evidence in the record which would indicate that the Hearing Officer was a person:
(a) Responsible for recommending the action upon which the hearing was based;
(b) who had a personal or professional interest which would conflict with objectivity in the hearing; or

(c) who is an employee of any agency involved in the education of Joshua Wilson.

DECISION OF THE REVIEWING OFFICER

The Mother's own evidence indicates she knew she lived in the Andover School district and not in USD 259 at all relevant times. She testified that she did not realize there was a residency problem, considering that Joshua had spent his entire life in the district, and the school district had not brought up the issue.

However, the evidence also indicates that the school district had no reason to know of any residency problem. There was no reason for the district to have provided Mrs. O. with non-resident enrollment forms.

Whether Mrs. O acted properly to protect her child's rights in other respects was not at issue at this hearing. The narrow issue involving the potential responsibility of USD 259 for Joshua's residential placement at three Springs was properly decided by the Hearing Officer's determination that Joshua W. was not a resident of USD 259 at the time his Mother appeared on his behalf for enrollment on November 20, 1995.

CONCLUSION

The Hearing Officer's Decision is Affirmed.

Date: December 31, 1996 s/ Alan F. Alderson, No. 8390

ALDERSON, ALDERSON & MONTGOMERY, L.L.C.

2101 SW 21ST Street

Topeka, Kansas 66604 (913) 232-0753

Reviewing Officer

CERTIFICATE OF MAILING

Alan F. Alderson hereby certifies that on this 31st day of December, 1996, he caused the original of the Reviewing Officer's Report to the hand-delivered to the Kansas Department of Education, 120 S.E. 10th Street, Topeka, Kansas, and a true and correct copy of the above and foregoing Reviewing Officer's Report to the deposited in the

United States Mail, first class, postage prepaid, addressed to the following:

Thomas R. Powell
Hinkle, Eberhart & Elkouri, L.L.C.
2000 EPIC Center
301 N. Main Street
Wichita, Kansas 67202-4820

Margie Best, Attorney
One North LaSalle Street
Suite 2200
Chicago, IL 60602

Timothy Connell, Attorney
CONNELL & CONNELL
318 West Central
P.O. Box 6
El Dorado, Kansas 67042

DATE: December 31, 1996 s/ Alan F. Alderson

APPENDIX H-DECISION OF HEARING OFFICER REPORT

HEARING OFFICE REPORT

Special Education Due Process Hearing for: Joshua W.
DOB: 5/1/78

Reason for Hearing: Parental objection to school district's determination that Joshua is not a resident of the Wichita School district, USD 259, and that the district does not have jurisdiction with regard to his education.

Hearing Officer: Michael P. Tilford

Date of Hearing: Friday, October 4, 1996

Time of Hearing: 9:00 a.m. – 3:30 p.m.

Location: 2000 Epic Center, 301 N. Main, Wichita, Kansas, Conference Room

Participants:

Anita O-Mother of Joshua W.
Margie Best-Counsel for Parent
Patricia Coffey-Counsel for Parent
Patrick Terry-Superintendent of Schools, Andover, USD 385
Mark Hartke-Department of Special Education, USD 259
Jerry Stewart-Director of Special Education, USD 259
Thomas Powell-Counsel for School District
Roger Theis-Counsel for School District
Terry Bachus-Executive Director of Special Education, USD 259
Robert Coleman-Principal, Sowers Alternative School USD 259
Carolyn Moncivias-Social Worker, Sowers Alternative School, USD 259
John Updegrove-Supervisor of Pupil Accounting, USD 259
Mary Stevens-Recording Secretary

Both Stenographic and audiotape records of the hearing were made.

HEARING DECISION: The Hearing Officer finds that Joshua W. was not a resident of the Wichita School District, USD 259, at the time he was represented for enrollment for the 1995-96 school year by his mother on or about November 20, 1995. The evidence and testimony presented in support of the parent's contention that Joshua was a resident of USD 259 at that time filed to contradict the Kansas statutes and regulations which establish the requirements for residency for education purposes. Under this decision, the Wichita school district has no responsibility for Joshua's program at Three Springs in Tennessee.

HEARING DECISION

This section is designed to present and discuss findings of fact and conclusions of law which relate to the decision of the Hearing Officer.

The issue for this hearing is very narrow. For the purpose of resolving the conflict between the parent and USD 259 about the responsibility for paying the costs of Joshua's program at Three springs, the issue to decide is whether Joshua was a resident of the district when he was enrolled on or about November 20, 1995. As noted in the decision, he is not. Kansas statutes are very explicit in defining the requirements for residency in school districts and delineate clearly the relationship of the child to parents and non-parents insofar as residency is concerned. There is no provision for a child under the age of 18 to establish residency in the absence of direct or indirect parental responsibility.

Most of the questioning of witnesses in this hearing centered on USD 259 Board policy P5506, which is titled, NON RESIDENT ENROLLMENT AND ADMISSION [underlining added]. It is the view of the Hearing Officer that

the statements in the policy refer only to non-resident students, making the focus on the policy appear to be a tacit acceptance that Joshua is not a resident of the district. Even if Joshua's enrollment on or about November 20, 1995, had been allowed to stand under the waiver possibilities, he would have remained a non-resident under the policy. A non-resident student who is permitted to enroll, even before September 20, is still a non-resident.

The attorney for the parent asked several witnessed when did Joshua cease to be a resident of USD 259. This is a fair question. In the opinion of the Hearing Officer, Joshua ceased to be a resident of USD 259 when his father left the district. Prior to that time Joshua met the residency expectations of K.S.A. 72-1046, (a), (1) because he was living with his father. Simply, "living with his adult sister", did not serve as an adequate substitute for the assertion of residency. The movement of Joshua's mother out of the district on March 1, 1995, did not have an impact on Joshua's residency until the father moved, thereby eliminating any parental residency in USD 259, and, therefore, USD 259 responsibility for his education. It is beyond the purpose of this hearing to determine who does have the responsibility for Joshua's educational program at Three Springs.

The parent's brief contained several detailed descriptions of cases involving the issue of residency in the delivery of and payment for special education services. While this information is appreciated, the situations differ significantly from this case primarily because of the clarity of the State's definitions and descriptions of residency at it relates to the responsibilities of both parents and school districts.

The Hearing Officer accepts the position of the school district that its determination that Joshua's residency in the district did not occur until January, 1996, rather than at the conference on November 20, because it was not realized until later that the Sport of Kings address was outside of its

boundaries. There was not evidence or testimony to refute this assertion. The fact that Joshua did not live with his mother was not a cause to trigger an investigation because he had not lived with his mother at her previous address within the district. The suggestion that the district's motives were fueled by concerns of the costs of a residential placement of Joshua was not supported by sufficient evidence or testimony.

In the closing statement of the attorney for the school district, the lack of authority of the hearing officer to grant a waiver of the non-resident enrollment policy because of severe hardships or very unique circumstances was strongly asserted. It is important to realize that the parent did not request that the hearing officer grant a waiver to the non-enrollment policy. In the opinion of the Hearing Officer, if a request for a waiver of the policy due to severe hardships or very unique circumstances had been made it would have been proper to consider the request. It is also the opinion of the Hearing Officer that a response to such a request could reverse a decision that the school district had already made. If this were not so, there would be little purpose to these and similar proceedings.

HEARING SUMMARY
Joshua W.
The following exhibits were entered into evidence for the hearing:
Title (Date)
Parents
#1 Letter from Atty. Margie Best to Dr. Larry Vaughn (December 4, 1996)
#2,3 Atty. Best's motion to appear Pro Hac Vice (January 7, 1996)
#4 Atty. Best's Certificate of Admission to the Bar of Illinois (January 4, 1996)

#5 Atty. Best's Certificate of good Standing, Northern District of Illinois (January 4, 1996)
#6 Atty. Best's Certificate of Good Standing, United States Court of appeals for the Seventh District (January 3, 1996)
#7 Letter from Hearing Officer to Atty. Best (January 21, 1996)
#8 Letter from Atty. Best to Dr. Patrick Terry (February 1, 1996)
#9 Letter from Atty. James Hargrove to Atty. Best (February 2, 1996)
#10,11 Letter from Atty. Best to Hearing Officer (February 2, 1996)
#12,13 Affidavit by Anita O. (February 1, 1996)
#14 Letter to Atty. Best and Mr. Mark Hartke (February 11, 1996)
#15 Letter from Atty. Best to Hearing Officer (February 22, 1996)
#16 Letter to Atty. Best and Mr. Hartke (May 28, 1996)
#17 Letter from hearing Officer to Atty. Best and Atty. Thomas Powell (September 15, 1996)\
Also entered and accepted is the parent's Brief in support of Joshua's Residency in U.S.D. 259.
School District
#1 Affidavit by Anita O. (February 1, 1996)
#2 USD 259 Board Policy P5506 (August, 1996)
#3 Parent's Permission to Exchange Information (11/20/95)
#4 Student Inquiry Form for Joshua (no date)
#5 Kansas Administrative Regulations, 72-946 through 72-967; 72-1035 through 1046; 72-8231 through 72-8234 (no date)
#6 Copies of pages 84-89 of Education of Handicapped (no date)
#7 Copy of page 48-49 of Education of Handicapped (no date)

#9 Map of Unified School District No. 259, 1993-94 (no date)

#10 Copies of Envelopes Addressed to Ms. Anita O. (December, 1995)

#11 Materials submitted by Ms. Anita O. in response to subpoena

Also entered and accepted is the school district's Prehearing Brief of U.S.D. 259 on the Issue of Residency.

The special education due process hearing was called to order at 9:00 a.m. on Friday, October 4, 1996. The Hearing Officer referred to an agenda for the hearing which he distributed. Those present were asked to introduce themselves. The proceedings were recorded on audiotape and by a court stenographer. The Hearing Officer stated that the purpose of the hearing is to resolve the issue of Joshua's residence as it pertains to whether or not the Wichita School District, USD 259, has the responsibility for his education. The burden of proof is on Joshua's parents and it is a closed hearing. Both parties indicated that they have understood their rights in the due process proceedings.

An oath of truth was administered to those who would be giving testimony. At the request of the parent's attorney, and without objection from the school district, the witnesses were sequestered.

The Hearing Officer approved an earlier motion to admit Attorney Margie Best, Pro Hac Vice

Attorney Best stated that she had a pending motion to join Joshua as a necessary party. Attorney Powell objected on the bases that he had not had a chance to review and research the motion, and requested the opportunity to respond to the Hearing Officer later in writing. Attorney Best said that the motion was a formality to bring to attention the fact that Joshua is now 18 years of age. Attorney Best also renewed her motion to join Andover which the Hearing Officer had previously overruled.

Attorney Powell objected to Attorney Best's intent to call all of the school district's witnesses or any witnesses on the basis that her list of witnesses did not include a summary of their testimony as requested of both parties by the Hearing Officer. Attorney Best's response indicated that the only witness to be called by the parent is Dr. Terry and his testimony is summarized in parent's exhibit #9 in the form of a letter from the school district's attorney. Also, that they are calling the same witnesses as the district and their testimony is summarized by the district. She will be seeking the same testimony as indicated by the district. Attorney Best indicated that she did not know the people in the district and who is in charge of various matters. She said that she does not feel there are any surprises.

The outcome of this discussion was the decision by the Hearing Officer to uphold the objection of the school district to the parent calling the school district witnesses provided that were provided 5 days prior to the hearing. Any witnesses called by the district can be cross-examined by the parent. In response to a request by Attorney Best, Attorney Powell identified the witnesses on the school district's list that he intended to call. Attorney Best requested that she be permitted to call those named as parent witnesses since they are all present and there would not be an imposition and she would not be limited just to cross-examination. Attorney Powell's objection to this request was sustained by the Hearing Officer. Attorney Best asked that the record show that being limited to cross examination and not being able to present the witnesses even though they are here would be prejudicial to her client's case. Attorney Powell stated that he would relieve the issue by withdrawing his objection and allowing Attorney Best to call the witnesses that he had indicated would testify. Those witnesses were identified as: Bob Coleman, Carolyn Moncivais, Terry Bachus, and John Updegrove. An extended discussion ensued about the parent calling witnesses identified by the school district, with a

particular focus on Sam Spaght, an Assistant Superintendent. Attorney Powell continued to object on the grounds that Attorney Best had not provided a summary of the testimony the parent was seeking, even in general. The Hearing Officer sustained the objection, thus limiting the witnesses the parent could present in direct testimony, and in rebuttal, to the previously identified witnesses.

In her opening statement for the parent, Attorney Best said that the Wichita school district, by board policy, has a more liberal residency policy, a more liberal enrollment policy than the State guidelines. She said that Ms. O. walked into the district offices in November, Joshua had already been in the school district all his life. The school district knew right away where Ms. O. lived. There was never any residency issue raised. They were raised in January only in the midst of these proceedings. She said if Joshua were not in a residential placement he would be at 144 s. Sheridan right now. He was in the school district the prior school year with an IEP that was in force until 11-18-95. The school district had dealt with his father before, they had had involvement with his mother. They had talked with a private school he was in the Fall of 1995, and had talked about here severe he was and recommended residential. When mother went into the district for residential, at that point, the district wanted no part of Joshua. Attorney Best said that there was no triggering event in November of 1995 that led Joshua not to be a resident of Wichita public schools. She concluded that with their open enrollment policy and their liberal enrollment policy, Joshua should be found to be a resident of this school district.

For the school district, Attorney Powell said that a lot of facts will not be in dispute, he believes, in this case. One fact is that Ms. O. does not live in the district. Another fact is the father does not live in the district either. Ms O. provides support for Joshua and, as of November 20, if Joshua had attended USD 259 schools she was going to provide that

support. There is apparently no dispute that Joshua lived at 144 S. Sheridan with his sister. Neither Joshua's sister or his grandmother acted as a parent. Attorney Powell said that the Kansas statute has two prongs. One is living with a parent in the district. Both parents lived outside the district so that prong is not met. Two was legal guardian, and there was no legal guardian situation. Three is a person acting as a parent. A person acting as a parent is either a person who has care and control of the child and provides a majority of support for the child and that's not the situation here. A second part of the acting as a parent is that a person within the district has actual control over the child and written consent has been provided by the parent or legal guardian to that person. Attorney Powell said it was made clear that Ms. O. was going to make all of the educational decisions regarding Joshua. He said that Sowers school staff met with Ms. O. on November 20, after she had phoned for a conference to reenroll Joshua. He said that Joshua left the district on January 27, 1995, and did not and has not attended a district school since then. There was one meeting of Ms. O. and Bob Coleman, and at that time a meeting was set up with a group of the staff at Sowers to discuss a placement for Joshua. He said that Ms. O. gave an address on sport of Kings which is a Wichita address. Attorney Powell said that, based on that, the staff made an incorrect assumption that Ms. O. resided within USD 259. He said that Mr. Coleman will testify that had he realized that Ms. O. did not live within the district that procedure calls for him to call the Executive Director of Special Education, Terry Bachus, and that decision would be made by Terry Bachus. He said Mr. Bachus's testimony is going to be that if he had been called on that day he would have taken the position that the education of Joshua was not the responsibility of USD 259.

Attorney Powell commented on several cases cited in the parent's brief and said that they are not germane, and that the issue for this hearing turns on Kansas statutes and USD 259

policy 5506. Attorney Powell elaborated on the *Catlin v. Sobol* case noted as exhibit H in the parent's brief. He pointed out parallels and differences in this case and the matter in hearing. Attorney Powell concluded by giving his view his view that the decisions in administrative hearings should be based on the interpretation of exiting statutes and policies. Attorney Powell wished to provide materials pertaining to cases in Kansas which speaks to the responsibilities of the hearing officer. Attorney Best objected on the grounds that these materials were not a part of the disclosure documents. Her objection was sustained by the Hearing Officer.

In beginning the presentation of witnesses, the parent called Dr. Patrick Terry as its first witness. Dr. Terry is the Superintendent of Schools in Andover, USD 385. In response to questions from Attorney Best, Dr. Terry testified in regard to parent's exhibit #9. He said that, 144 S. Sheridan is not within the boundaries of the Andover school district; Joshua w. has not resided within USD 385; he is not familiar with the open enrollment policy of the Wichita public schools; Sport of Kings is within the Andover school district boundaries and has a Wichita mailing address. An objection was raised by Attorney Powell to a question by Attorney Best about students living in the Andover district who are being bused to Wichita schools, on the grounds that it was beyond the scope of exhibit #9 which determined the limits to the testimony the witness can give. The Hearing Officer sustained the objection. There were no questions on cross examination or by the Hearing Officer and the witness was excused.

Mr. John Updegrove was called as the next witness for the parent. Mr. Updegrove is the Supervisor of Pupil Accounting for the Wichita School District. Mr. Updegrove first testified about school district exhibit #9, a map of USD 259. Mr. Updegrove testified that, the maps are printed and distributed to schools upon request; he was never involved in

a decision regarding Joshua W.'s residency; it is possible that he could get a call from a school employee about a student's residency in cases where the child lives in the district but does not live with a parent; a parent would have to request the map; a parent, without the map, would not know the boundaries of any one school district; employees in his office utilize a larger map with the boundaries highlighted, and a computer program to determine whether an address is within the boundaries highlighted, and a computer program to determine whether an address is within the school district boundaries; it would take about 10 seconds to punch an address upon the computer. Mr. Updegrove was then shown school district exhibit #3. In response to questions from Attorney Best, he testified that, he had not seen the document before; the address on the document is 14221 E. Sport of Kings; it would have taken about 10 seconds to determined that this address is not in the Wichita school district; he does not have anything to do with State aid; the school district is reimbursed based on its September 20 enrollment; the September 20 date is the reason the board enrollment policy is based on the September 20 date; one of the district's objectives is to get as many students enrolled by the September 20 date as possible because of the State aid received; he was not contacted on November 20 in regard to Joshua's residency or that of Ms. O. Mr. Updegrove was asked to testify about Board policy 5506. Attorney Powell objected on the grounds that this is outside the summary he provided about the testimony of Mr. Updegrove. The objection was overruled by the Hearing Officer. Mr. Updegrove testified that, he is aware of the non-resident enrollment and admission board policy 5506; the intent of the funding and enrollment policy is that if a student resides outside of USD 259 and seeks to enroll in Wichita schools, then with the approval of the principal of that site will allow enrollment prior to September 20, and not charge that student tuition, there have been times that a student who

enrolls after September 20 is charged tuition; it's possible to waive the tuition but they would have to go through Sam Spaght; at this point he cannot say how many students from outside the district were enrolled prior to September 20; a student who lives on Sport of Kings could attend Wichita schools if they asked; they school principal would be the person to inform a student about Board policy 5506; the policy does not address who contributes to the child's support; the policy provides the opportunity for students who may have moved to the suburbs to continue to attend Wichita schools if they wish; the basic policy is a student has the right to attend schools in a unified school district according to the address of the parents of lawful custodian. When it gets into living with a brother or sister, then we have to get into those issues, this means who has custody, who has residency, who is the person acting as the parent, where do they live, where does the parent live; he does not know if this type of investigation was done in Joshua's case. Attorney Powell objected to a question from Attorney Best as to would there ever be situations that you are aware of where the district denied the open enrollment of a student who was actually living with Wichita. The objected was sustained by the Hearing Officer. In responding to further questions from Attorney Best, Mr. Updegrove said that, there are about 47,000 students enrolled in the Wichita district; he has never met Joshua.

On cross examination, Mr. Updegrove testified that, he highlighted the boundaries of the school district on the school district map; he also located the Sport of Kings address; he located it on the map and also grove out to see it; 14221 Sport of Kings is outside the boundaries of USD 259; the address shown on district exhibit #3 is a Wichita address; the term open enrollment policy is a true statement prior to September 20, but not after September 20; enrollment of students outside the district after September 20 is allowed only when there is a severe hardship or very unique

circumstances; it is outside his area of authority to decide on whether there is a severe hardship or unique circumstances.

In response to questions from Attorney Best on redirect Mr. Updegrove testified that, he cannot answer the question of what are severe hardships or unique circumstances; he does not really know the exceptions are; he remembers a case judged to be severe hardship or unique circumstance some years ago but he does not recall the details. Mr. Updegrove was excused from further participation in the hearing.

Attorney Best called Mr. Terry Bachus as the next witness for the parent. Mr. Bachus is the Executive Director of Special Education for USD 259. In response to questions from Attorney Best, Mr. Bachus testified that, he has never met Joshua; he does not believe he has ever met Mr. O.; in regard to district exhibit #2; Board policy 5506, he makes the decision on admission and enrollment for special education; Dr. Spaght handles the regular education side; he does not believe there is a difference in the way the policy is applied between regular education and special education and that he is the only person on the special education side so there will be consistency; he cannot answer as to the purpose of the policy, his role is to enforce the policy; the latest revision of the policy was August, 1996; the policy liberalizes the strict residency requirements of the State until September 20; the only waiver after September 20 would be emergency situations; he has never authorized a waiver after September 20 because he has never had a situation where he had been asked. Under current State statutes the district of residence is responsible to deliver the services on the IEP, and he would see no reason to take over the responsibility of another school district; that a student whose parents moved out of the district could be served through the end of the semester, the school district of residency would be billed for tuition only if there was a contract with the Wichita district; there was nothing of this sort done with the Andover district in this

case; the director of special education for Butler county called him prior to January inquiring about Joshua; he told the Director, Mr. Bussey that Wichita did not consider him a resident and he was considered a resident of their district; neither he not any one he knew sent a note to the parent notifying her of this decision; he had the awareness that the mother's current residence was not within the Wichita school district; he received the information through the building principal, Mr. Coleman; He told Mr. Coleman that unless there was a contract for services with Andover, the Wichita district would not serve Joshua; there are not documents that he generated regarding his decision; he did not communicate information about Board policy 5506 to the parent; he believes that Mr. Coleman communicated the information properly to the parent; the responsibility for accepting an application for admission under the Board policy in the Principal"; the application is typically verbal; he would not let Joshua finish the semester because at the time; he was not in the district; when the parents of a child in special education moves out of the district, typically service is ceased and we notify the parent we're going to go that and then its up to the parent to contact the district in which they reside to tell them the child's going to be enrolled; if a student in special education were in his senior year and his parents moved out of the district he would contact the district in which the parent now resides to determined how they wish to handle the situation; he did not check into who had legal custody of Joshua; a child would not be considered a resident if the parent with legal custody moved to a state like New York and the child lived with the other parent who did not have legal custody; the social worker of the building to which the child is assigned typically has the responsibility for collecting documents of custody, etc.; he does not have a definition of severe hardships or unique circumstances; if the parent does not reside within the district, he does not approve special education placements, period; he does not know if

this is true of regular education students; he can not speak to whether the Board policy if money-based; he does not feel he was being asked for a waives when Mr. Coleman came to him and said there was a residency problem; special education students cost more than regular education students; the cost difference was not the reason for turning them down out-of-hand, the State statute makes the district of residence responsible; there are 3 to 4 being charged tuition for special education services; it is the district of residence's responsibility to offer a contract; the district occasionally contracts with other school districts to provide special education services; the district contracts with private agencies to provide services; he would not be surprised to know that Joshua is 18 now; he does not believe his practice is out of kilter with board policy but it is possible; an IEP is effective for one calendar year, in reference to parent exhibit B-3, Joshua's IEP start date is 11/18/94 and the end date id 11/18/95; the statute does not indicated that who owns the house or pays taxes on it is used in determining residency; he verified that Ms. O.'s address was outside the district from a printout in his office; in regard to school district exhibit #4, STUDENT INQUIRY form for Joshua, the address shows as 144 S. Sheridan; 10/5/94 is shown as the exit date for Joshua; he has never seen an enrollment form for Joshua; he talks directly with Mr. Coleman; a part of the purpose of the Board policy would be to provide continuity for the student and another part might be to collect money from non-resident students and to increase the number of students prior to September 20; 18 year olds who live in the district legally become a resident; now that Joshua is 18, and if he legally lived in the district, the district would be obligated to develop an IEP for him and serve him; payment for a residential placement would be made only if the staff at Sowers determined that it was an appropriate placement; he does not know if he has an opinion on the dichotomy between having an open admissions policy versus the State

policy that says the child resident where the parent resides or a person in place of a parent [ending unintelligible on the tape]. His intent is to enforce the State statute as we interpret it and respond to the Board policy as we interpret it; he really does not have a clue as to just when he talked with Mr. Coleman; he does not recall a conversation, and does not know that he had it, with Mr. Coleman in which Mr. Coleman told him that he had talked to one of the people at Kemper, a private school where Joshua had been attending in the Fall just prior to this enrollment in the district, and that that person had recommended to Mr. Coleman that Joshua needed residential placement; even if he had had the conversation it would still be a multidisciplinary team's responsibility to determined whether or not they agree with it, whether or not residential services are required; it would not be a reasonable step to immediately call a multidisciplinary team together unless the student is a resident; he did not ask Mr. Coleman the sequence of steps.

A recess was declared for lunch.

Upon reconvening the hearing after lunch, and in response to questions from Attorney Powell on cross examination, Mr. Bachus testified that, in regard to school district exhibit #4, the program information speaks to entrances and exits from special education programs, in regard to parent's exhibit B-3, it is the IEP plan page specifying the exceptionality and related services and the start and end dates for Joshua; exhibit #4 shows that Joshua exited the district January 12, 1996; exhibit #4 shows that he entered the district on November 20, 1995; the exhibit #4 shows that Joshua was not in the Wichita public schools between January 27, 1995, and November 20, 1995; when a student leaves the district, the district no longer provides the special education services; if Joshua had not been residentially placed after November 20, but had attended Sowers and no one had caught the fact that his mother lived outside the district, and three weeks later it was found out,

the district would have terminated services because he did not meet the Board policy on the September 20 date, he would not have met the Board policy on the November 20 date, we would not have felt obligated to continue the services because he was not a resident of the district; in regard to district exhibit #2, item No. 2 refers to a child who is enrolled prior to September 20; KSA 72-8233 refers to the contracting of services which means contracting with other school districts to provide services within our district for a student who is a resident of another district; a contract for services would be accepted if the area in which the service is desired is full; Joshua would not be able to attend USD 259 under paragraph 7 of Board policy 5506 because he was in the 9th grade as of 11/20/95 and paragraph 7 requires that he be in the 11th grade; Joshua would take advantage of the services of the district now that he is 18 by returning to the district, enroll in school, then we would pull together a multidisciplinary team to determined what types of services Joshua would require; if Joshua were to ask for a determination to be made as to whether residential services were needed, that determination would be made; in regard to district exhibit #1, an affidavit from Ms. O., paragraph 3 , Joshua was not in attendance in Wichita schools on March 1, 1995, when Ms. O. moved to Sport of Kings; in regard to exhibit #10, he does not know who put return to sender, wrong address on the envelope; it is his understanding that the mother lived outside the district; it is his understanding that the mother was providing support for Joshua; it is his understanding that Joshua was living within the school district; he did not know who the person Joshua was residing with; it was his understanding that the person was not acting as a parent; he would not have considered the case an extreme hardship.

On redirect questioning by Attorney Best, Mr. Bachus testified that, he found out what KSA 72-8233 means by reviewing it over the lunch hour, he reviewed his testimony

with Attorney Powell but others were in the room; he did not use any of the affidavit information in reaching his decision or cause him to reconsider his decision; in regard to district exhibit #4, information about Joshua's attendance at Kemper is not on the Student Inquiry form because it is not a district facility; the Youth Residence Hall is operated by the County but the district provides the classroom teachers for that facility; any special education services as deemed appropriate by the IEP are provided by the district while in the Youth Residence Hall; he does not personally supervise the Youth Residence facility as part of his duties; he did not look into the reasons Joshua is a 9th grader at the age of 18; the fact that Joshua is a 9th grader at the age of 18 would not have anything to do with his decision on residency; he does not know why January 12, 1996 was picked as the exit date; the form is for the purpose of providing information to the building when the child changes building within the district; Patricia Kohl (?) is a psychologist; he did not contact Patricia Kohl in making his decision on Joshua; he does not know where Joshua was on March 1, 1995 when Ms. O. changed residencies; if he was in the Youth Residence Hall it would be on the Student Inquiry form; Joshua has been in lock-up twice which is associated with some type of criminal activity which is different from the type of residential placement being talked about; the Youth Residence Hall is a residential placement; he does not know what Kemper is. Ms. Bachus was excused as a witness.

Ms. Carolyn Moncivais was called as the next witness for the parent. Ms. Moncivais is a school social worker at Sowers High School. In response to questions from Attorney Best, Ms. Moncivais testified that, Sowers is a special education school in the district; she first became aware of Joshua in Fall, 1994; she has had no contacts with Joshua; her role in determining a student's residency in the district is just to make certain that they are a resident in the district; she did not make any decisions as to Joshua's residency; she was

present the day Ms. O. came in to register Joshua; she had not talked with Ms. O. before that time; she was aware that Ms. O. was seeking a residential placement; there was no statement to Ms. O. at the meeting that Joshua was not a resident; Joshua was enrolled at Sowers because prior information said that was the school he was to be assigned to; in cases of divorce a part of her responsibility is to determine who is the rightful custodial parent; she does this usually by asking the parent that accompanies them and then if there is a question asking for documentation of divorce papers; in Joshua's case they asked Ms O. if she was the custodial parent and we took her word that she was; none of that was a problem at that time; she gathers custody papers but not in every case; Ms. O. told them that she lived on Sport of Kings and that Joshua did not live with her but lived with an older sister.

In response to questions from Attorney Powell on cross examination, Ms. Moncivais testified that, a decision on residential placement was not made at the multidisciplinary team meeting because they were not at that point and did not have enough information to make the determination; the plan to make that determination was to contact agencies Ms. O. indicated would have information and would review the records and get back with her; it was hoped that Joshua would begin school immediately so they could do some observation; she had difficulty contacting Ms. O. and eventually spoke with her on December 12 and was told that Joshua was in a program in Tennessee; Ms. O. did not ask her to pursue a placement of that point but said the matter was in due process hearing and gave her the name of her lawyer; she assumed that the address Ms. O. gave was a Wichita address because is said Wichita, 67230; she, Mr. Coleman the principal, Mr. White the psychologist, Mr. Henderson the counselor, and Ms. O. were present at the meeting on November 20; to her knowledge there was no

mention at the meeting that Joshua might attend Three Springs.

In response to questions from Attorney Best on redirect, Ms. Moncivais testified that, at the meeting on November 20 no on asked Ms. O. to sign a consent for a new case study evaluation; she is not aware that anyone sent Ms. O. a letter or notice that the meeting on November 20 was a multidisciplinary conference that the district prepared; when she spoke with Ms. O. on December 12, no one in the district had told her that they would deny service because Joshua is not a resident.

In response to questions from Attorney Powell on re-cross, Ms. Moncivais testified that, there was no decision made at the meeting on November 20 to do a comprehensive re-evaluation of Joshua for purposes of the IEP. Following several impromptu questions from both parties, Ms. Moncivais was excused.

Mr. Robert Coleman was the next witness for the parent. Mr. Coleman is the Principal of Sowers School. In response to questions from Attorney Best, Mr. Coleman testified that, he does not recall the exact date he first talked with Ms. O. in the Fall of 1995, he got a telephone call from her in November, prior to that he had received a call from Kemper Military Academy regarding Joshua; when Ms. O. called she indicated that Joshua was discharged from Kemper and could not continue there; Ms. O. told him that according to Kemper Joshua was discharged based on conversations Kemper had with the school district about Joshua; he is not aware that Kemper also talked with Patricia Kohl (?) of the school district, but Ms. O. mentioned that to him; he was not aware that Kemper was recommending residential placement; Ms. O. said that she wanted a residential placement for Joshua and he told her that before they could consider that they needed to get him enrolled; Ms. O. came in and enrolled Joshua on Friday afternoon, November 17; he was not aware on the 17th that Joshua did not live with

Ms. O. because the address he had was the one he had when he enrolled before; he became aware that Joshua did not live with Ms. O. on the 20th at the meeting when she filled out the release forms; the only record of placement IEP the district had for Joshua indicated a special day school which would have been at Sowers; he offered to send a cab to transport Joshua to Sowers until bus transportation could be arranged; he was not aware of a residency conflict until they were in the due process hearing; he did not ask someone to punch the computer to see if the Sport of Kings address is in the Wichita school district; he does not consider Joshua to be a resident at this time because he does not live within USD 259, his mother does not live within USD 259 and she is the custodial parent as he understands it; during the years Joshua lived with his father, the father was considered the custodial parent because the father was responsible for taking care of him, his father was the one who signed the due process papers and the IEP at the time; financially he had no idea what was happening and it would not necessarily have made a difference. Additional questions were asked by Attorney Best about what Joshua's residency would have been in March 1995, Summer, 1995 and October, 1995, and about Board policy 5506.

On cross examination, Mr. Coleman responded to questions from Attorney Powell and testified that, he first became aware of the residency conflict after it came under the hearing process in early to mid December; he did not provide Ms. O. with Board policy 5506 because of being in the hearing process and Attorney Powell or Mr. Hartke would have that responsibility. At this point there were no further questions and Mr. Coleman was excused.

Ms. Anita O. was the next witness. Ms. O. is the mother of Joshua W. In response to questions from Attorney Best, Ms. O. testified that, Joshua last lived with her in 1988; she did not see Board policy 5506 until yesterday; at some point in Fall, 1995 Joshua was in a private residential facility

called Kemper; Mr. Early (?) at Kemper told her that because of his conversations with Mr. Coleman and Patricia Kohl (?) he felt that Kemper Military did not have the adequate program for Joshua and said that he needed a special residential education; Mr. Coleman was aware that special residential placement was being requested; Mr. Coleman told her to come in and enroll Joshua. This was on November 17; Mr. Coleman told her to come in for a conference on November 20 whose purpose was to come up with a game plan, to talk about whether or not special education would be appropriate, kind of review; that they were going to talk about whether or not residential was appropriate, what the game plan would be to get to there; at the conference they talked a lot about Joshua's problems at Sowers, where he has been; no one asked her to produce any kind of proof of custody, guardianship or anything like that; until the end of October, 1995, Joshua's father lived in the house on Sheridan when he moved out of the house, out of the district, to someplace else; the district indicated no problem with transporting Joshua from the Sheridan address rather than Sport of Kings; that she would have done the paperwork they would have asked her to do if the district had indicated a residency problem because Joshua did not live with her, but there was a system for requesting a waiver; Joshua has never lived at Sport of Kings; at the end of the meeting on November 20 she remembers the last option that the district gave her which was that he could come to Sowers and spend the whole day there, the Carolyn and Bob and Mr. White left, leaving Ken Henderson and the last option, he said that he didn't think Joshua could make it at Sowers, that he could be willing to let him come in two hours a day, get his GED, and that he had been in the prison population and that maybe that what he needed was prison to straighten him out and that was not an option in her opinion; it was after the meeting on the 20th that she placed Joshua in Three Springs; she found Three Springs through an educational consultant she had

found through Kemper; if Joshua came home today he would be living at 144 S. Sheridan; Joshua has severe emotional behavioral problems and that he was a disabled child that she could not handle.

In response to questions from Attorney Theis on cross examination, Ms. O. testified that, up until March, 1995, her address was 2181 N. Riverside Boulevard; she knew her new residence of Sport of Kings was in the Andover school district; Joshua was a student at Sowers in November, 1994; When Joshua exited the district in January, 1995 he lived in Larned at Larned Youth Facility for about 6 months; upon Joshua's release from Larned he returned to Wichita and resided either at 300 S. Winterset or 144 S. Sheridan; immediately prior to November 20, 1995, Joshua lived at Kemper Military Academy; her affidavit, school district exhibit #1, states that on November 20, Joshua lived at 144 S. Sheridan; Joshua was physically in attendance at the house at 144 S. Sheridan on a repetitive basis, and could be found there; she placed Joshua at Three Springs on November 21; she applied to Three springs on November 3, 1995; it was her intention to enroll Joshua at Three Springs, or someplace, she had made several applications; Joshua physically got to Three Springs by her taking him; she picked Joshua up at Kemper on November 21, and took him to Kansas City airport; she accompanied Joshua to Three springs; she does not recall whether she purchased the airline tickets before the 21st or at the ticket counter on the 21st; Joshua was at Kemper on November 20, 1995; the transportation arrangements made at the conference on November 20 was to pick up Joshua at the address at 144 S. Sheridan; she said that the address on Sheridan is where she told the school district people at the conference on November that Joshua would be staying; Joshua was not at 144 s. Sheridan on November 20. He was at Kemper Military School.

On redirect questions from Attorney Best, Ms. O. testified that, actually, Joshua was being ejected from Kemper; on the 20th he was coming out of Kemper no matter what; she had already requested residential; Kemper was recommending residential special education; Kemper had already discussed residential special education with the district; picking Joshua up at 144 S. Sheridan was one of the options; at the meeting on the 20th the staff at Sowers expressed some concerns about Joshua making it at Sowers; as she remember it, Carolyn said that most kids at Sowers had a honeymoon but that Joshua had never had a honeymoon, and that Ken Henderson said that maybe jail oughta be the way to go, and she thinks Bob Coleman said something about, that Josh had been a difficult child; that Bob told her that her believed by what he could remember of Joshua's behavior that he was behaviorally handicapped, so from what she was getting from the discussion with the people that already knew Josh, that that [residential] was really where they wanted to see it go; that money was the holdup, who was going to pay for it, that was the whole deal; she does not remember if the district asked her to sign a consent to do a re-evaluation of Joshua; they told her to join in a parent support group and get a lawyer because that is part of due process; she had made financial contributions to Joshua prior to November 20, 1995. On recross examination questions from Attorney Powell, Ms. O. testified that, Bob Coleman told her that she ought to get a lawyer. He was talking about what her rights are under due process; she does not know that he told her to get an attorney in case she disagreed with the recommended placement of Joshua; he just told her to get an attorney; she remembers the words due process; probably she told them at the meeting on November 20 that Joshua was at Kemper Military Academy in Missouri; she does not recall whether she did or not tell the district at the meeting on November 20, that Joshua was at Kemper Military School in Missouri; she remembers the

discussion that they would offer to pick Joshua up; they did not get to the point of making the arrangement to pick Joshua up so, no, she did not tell them that they wouldn't be able to pick him up because he wasn't living there; after the got done with Ken Henderson she did not have any intention on that date of Joshua attending Sowers; if she could not find another placement prior to November 20, she would have had the intention of sending Joshua to Sowers; she honestly does not recall whether she found out prior to November 21 that Three Springs would be available; she does not remember when she bought the tickets for the plane they missed; she does not remember if she bought the tickets before or after the meeting on the 20th.

In response to questions from Attorney Best, Ms. O. testified that, she believes Joshua had been at Charter in July; that she was providing the staff at the meeting with information with every placement that she knew about, because she didn't care; Mr. Coleman was present and had acknowledged [in his testimony] that he had talked with the Kemper people; she would have definitely considered a residential placement for Joshua if the district had offered it at the meeting on November 20, depending on what it was; they did not offer any residential placement.

In response to questions from Attorney Powell, Ms. O. testified that, on the 20th there was some discussion that they would need to further evaluate Josh and Josh's situation before they made a final decision on his educational placement; she signed several forms on November 20 so they could get more information so they could make an evaluation; definitely, on that date it was obvious that they had not completed the evaluation process.

In response to questions from Attorney Best, Ms. O. testified that, in actuality the forms they gave her were release forms; she does not recall seeing any document that is a form where the district said; we want to do a case study, sign this; that it is his [Attorney Powell?] spin on what you

signed; she does not recall any case study evaluation or reevaluation forms.

In response to questions from the Hearing Officer, Ms. O. testified that, she does not remember if the issue of Joshua's father moving out of the home at 144 S. Sheridan ever came up at the meeting on November 20; Joshua's father acting as Joshua's legal custodian in signing papers such at the IEP met with her approval; she probably would have put Joshua in the Tennessee facility even if the issue of his residency at been brought up at the November 20 meeting because at that point in time she needed to find a place for Joshua.

In response to a question from Attorney Best, Ms. O. testified that, she does not remember whether at the meeting on November 20 the school district asked why the father had signed the IEP's up to that date but why he wasn't there and whether they showed her Joshua's current IEP which had his signature on it; [she does not believe?] that they asked her to sign an IEP to allow them to put Joshua in Sowers; she didn't sign an IEP last year. In response to a question from Attorney Powell, Ms. O. testified that, on November 20 the dad was living outside USD 259; she made it clear to the Sowers staff at the meeting on November 20 that she could be making the decisions regarding an educational placement for Joshua because the dad had moved and it was no longer his place to make them; the decisions on Joshua's education were with her on November 20.

Ms. O. was excused from further participation as a witness. This concluded the parent's direct presentation of evidence and testimony.

Attorney Powell said that the school district had nothing further to present.

Attorney Best said the parent has no rebuttal witnesses except those who are not here who are on the list.

In her closing position, Attorney Best stated that it is the parent's position that Joshua had been a resident of this

school district throughout this entire school year, since November, the date in question. He was a resident before November. The fact he was in a private school doesn't mean that he didn't have a home in the district. In her opinion the case shows in that the district has a very broad policy for accepting out-of-district students if the money is right and there is an advantage to it. If the child is one who has special needs or is a special education student like Joshua the district can easily deny services to the child and that's what they're using this residency policy for. We have a district whose Board has enacted a rather liberal open enrollment policy. If the district had told the mother there is a residency problem and here is a copy of the Board policy she would have done everything to make sure that she applied for any kind of a waiver. That never was presented to her and the district acknowledges that. Joshua is 18 now. The district also testified that at age 18 he can decide his own residency. His affidavit is in here saying that he is a resident of the school district. The school district did not take any steps if it truly believed he belonged to Andover to enter into any kind of contractual relationship with Andover, or to notify the mother in writing that we have made a decision on residency and here are your options. One district staff said that he made the decision by himself but Mr. Coleman said he never took it to Mr. Bachus. Joshua should be granted the rights due him under special education. The intent of congress in passing IDEA it to provide services to special education students, to have districts actively seek out and serve these students. If this district thought that they have to serve this student they should have decided it right then.

It would have taken 10 seconds to punch in the Sport of Kings address and find out that it is not in the district. They didn't do that because they thought let's put him at Sowers and see what happens. When the cab shows up maybe he'll go and maybe he won't. It hasn't worked before but nevertheless that's the placement. When they found out that

residential was at stake and the parent intended to pursue that, then in January the district determined that no he's not a resident in order to avoid any responsibility to Joshua. But there are various ways Joshua could have established residency in the district even if the district's argument that Ms. O. is not a resident were true. So, he should have had the right to have that explained to his parent and he should have had the right to apply for those waives. But to withhold that information from a parent and then say, well, you know, you have no options, six months later or however many months later makes no sense. We also heard conflicting testimony about whether a student can continue or cannot continue for a semester, can continue for the entire year once they are in the district. The district also never addressed the fact that what happens if a private school student returns to the district after September 20 and enrolls in the district and misses that timeline. What are their rights. There are various issues, factual issues that need to be resolved in order to decide this case. It is not an easy case. It doesn't follow the statute but that's typical of most states. A lot of states have very restrictive residency requirements. In Kentucky for example the requirement is that the child sleep in the district. That eliminates every residentially placed student. So that hasn't held in court cases. You have to look at the benefit to the child and what is in the best interests of the child. It is best for the child to find out retroactively that you are not a member of the district because you need residential placement. That isn't fair and that isn't the intent of Congress. She believes that the evidence shows and there is enough reason and enough meat and potatoes in that district Board policy that would have allowed Joshua to remain a district resident throughout this entire school year. There was no intent to change his residency, he lived there with his sister, there was no difference in where Ms. O. lived, as of November of 1995, there was no difference in the amount of support she paid for his benefit. The difference is that his

father no longer lived there, but his adult sister did and it was a family home. All of these factors [should be weighed?] in reaching your determination and we ask that you find that Joshua is a resident of this school district.

In the district's closing statement, Attorney Powell said that he would be real short. He thinks that we are sort of mixing apples with oranges when we talk about where Joshua resides or where he doesn't reside when you look at the Board policy 5506. The Board policy in regards to the open enrollment period that occurs prior to September 20 doesn't talk about where the student resides or where the student doesn't reside. It talks about that the student may be enrolled in unified school district 259, so to have the open policy its not whether or not he's a resident attending a private school it is a question of whether or not he is an enrolled student in USD 259, so clearly Joshua was not enrolled at Fall semester of 1995 prior to September 20 was not a student enrolled under the open enrollment policy of this district. He did not enroll or attempt to enroll until November 20. On that date it's clear now that his mother did not reside within the district. Its clear that she had legal custody of him on that date, and its clear that she had responsibility for his educational decisions. And, it's also clear that his dad did not have responsibility for those educational decisions on that date, and he also did not live in the district. Its clear that on that date he was not living with a parent or with a person acting as a parent under the statutes, so he did not fall under the statutes. Under Board policy if you attempt to enroll after September 20, it is not a broad open policy. By the word in the policy it is very clear that it is very limited right, and that limited right is it's a severe hardship or very unique circumstances, and in this case its clear that there was no severe hardship or very unique circumstance under the district's definition and under the way the district has handled that policy in the past that would have allowed Joshua to enroll in the district. On September

20 he was allowed to enroll in the district under a mistaken believe, and its not anything. Ms. O. did, that the staff at Sowers when they saw the Wichita address they made an assumption that that was Wichita, and when the problem was found out it was brought up as an issue in this case. He thinks it is clear through Terry Bachus's testimony that if he would have stayed at Sowers and this had been discovered at a later date that the same results would have happened. It's just that in this case a due process proceeding was instituted prior to the time the district found out that Joshua was not a resident. So, we didn't treat it any differently than we would have if he had been a resident of the district, and again its the parents burden of proof to show that we did, and there has not been any evidence that's been presented to show that we treated Josh any different in taking the position that he was not a resident of the district. In conclusion, he's not a resident of the district. He did not enroll until after September 20, or attempt to enroll, he enrolled November 20, and under our very narrow policy that applied to enrollment after November 20, he did not fit a severe hardship or unique position. Again, that, as is as pointed out in the brief, that's a district decision that the district should be allowed to make, and its not a decision that should be made ad hoc by a hearing officer. The hearing officer can look at the decision made by the district, but the hearing officer should not substitute under Kansas law his judgment for that of the school district. That should be a school district's decision and that's the decision that was made.

The Hearing Officer stated his responsibility to consider the evidence and testimony presented at the hearing in reaching a decision, and that he had 10 days within which to do so, including weekends. Once the decision is reached within the 10-day period, he explained that he has 24 hours within which to make it available to both parties. He said that neither party has the right to appeal his decision. The timeline for appealing is within 30 days after receiving the

decision. The next level of appeal is the State Department of Education, through the State Commissioner of Education. Hearing no questions from either party, the Hearing Officer thanked those present for their participation and adjourned the hearing at 3:30 p.m.

APPENDIX I- CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

20 U.S.C. Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) –

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

20 USC Sec. 1415 (i)(3)(B) Jurisdiction of district courts; attorneys' fees

(B) Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

28 USC Sec. 1254(1) Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 USC Sec. 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 (a)(3)

34 C.F.R. § 300.511

Kan. Stat. Ann. § 72-1046

72-1046. School residence; definitions.

(a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c), the child lives in the district as a result of placement therein by a district court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

(b) Any child who has attained the age of eligibility for school attendance may attend school in a school district in

which the child is not a resident if the school district in which the child resides has entered into an agreement with such other school district in accordance with and under authority of K.S.A. 72-8233, and amendments thereto.

(c) Any child who has attained the age of eligibility for school attendance and who lives at the Judge James V. Riddel Boys Ranch as a result of placement at such range by a district court or by the secretary of social and rehabilitation services shall be deemed a resident of unified school district No. 259, Sedgwick county, Kansas, and any such child may attend school which shall be maintained for such child by the board of education of such school district as in the case of a child who is a bona fide resident of the district.

(d) As used in this section:

(1) "Parent" means and includes natural parents, adoptive parents, stepparents, and foster parents;

(2) "person acting as parent" means (A) a guardian or conservator, or (B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction; and

(3) "homeless child" means a child who lacks a fixed, regular, and adequate nighttime residence and whose primary nighttime residence is (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill); or (B) an institution that provides a temporary residence of (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.